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In The

Supreme Court of the United States

FRED E. HENNING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a motion for reconsideration of the denial of a defendant's motion for new trial is in fact a subsequent motion for new trial rather than a motion for reconsideration because it raises grounds not available at the time the "original" motion for new trial was filed, but which were created by the trial court's disposition of a motion for acquittal.

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The opinion of the Court of Appeals (App. A) is unreported.

The opinion of the District Court (App. A) is unreported.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Fed. R. Crim. P. 33:

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such

further time as the court may fix during the 7-day period."

Fed. R. App. P. 4(b) provides in relevant part:

"In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order – but before entry of the judgment or order – is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal:

(2) for arrest of judgment;

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment."

STATEMENT OF THE CASE

Petitioner was general counsel of a savings and loan institution based in Toledo, OH, which collapsed, at least in part, due to a series of improper transactions between the bank and the son of the president of the bank. As such, he sat on the bank's loan committee and approved numerous loans.

After the collapse of the bank, the bank's president, Donald Baker, and Baker's son, William, pled guilty to criminal charges arising out of the collapse. It was largely undisputed at Petitioner's trial that the Bakers conspired together to obtain loans from the bank to William, based on inflated appraisals and financial statements. At no time did the Bakers ever implicate Petitioner in the criminal activities, and they did not testify at trial.

Petitioner was charged with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and several counts of bank fraud, in violation of 18 U.S.C. § 1344, and of misapplication of bank funds, in violation of 18 U.S.C. § 657. A jury trial was held in the United States District Court for the District of Ohio, Western Division (Carr, J.).

At trial there was no evidence produced that Petitioner had any knowledge of the inflated financial statements. The only evidence that Petitioner had any knowledge of the falsity of the appraisals was a single disputed sentence alleged to have been stated by Petitioner during a two day interview with one Special Agent Rolf which occurred several years after the events in question. In that single sentence, made during a discussion of one of the false appraisals, Petitioner stated that

he "knew" that one of the appraisals was inflated. At trial, Agent Rolf testified that he understood Petitioner to be referring to what he had known at the time of the appraisal, and Petitioner testified that, in the context of the discussion, it was or should have been clear that he was referring to what he came to know through the investigation, and not something he knew contemporaneously with the event. None of the Government's many witnesses, including the bank's in-house appraiser, Leon Corns, who admitted to drafting the false appraisals, indicated in any way that Petitioner knew of the false appraisals, with the exception of the understanding asserted by Agent Rolf, of Petitioner's single statement.[1] The Government never put Donald and William Baker on the stand in spite of the fact that the Bakers had already had guilty pleas to similar charges accepted, and had thus become virtually immune from further prosecution.

At the end of the trial, Petitioner was convicted of one count of conspiracy, two counts of bank fraud, and three counts of misapplication of bank funds. The jury acquitted Petitioner on one count of bank fraud and two counts of misapplication of bank funds.

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[1] Prior to sending the case to the jury, the trial Court stated on the record, to Counsel for both sides, that "there's probably enough to go to the jury but it is a slender thread * * * ". The Court went on to state that the testimony of Agent Rolf concerning his two-day interview with Petitioner "is a very slender thread in my view from which to suspend a man's freedom and his livelihood."

Among the instructions given to the jury was the so-called *Pinkerton*[2] charge, which instructed it that it could find Petitioner guilty of the substantive counts if it found him guilty of conspiracy and found that other conspirators had committed the substantive acts. It is undisputed that the Government produced evidence that the president of the bank, Donald Baker, and his son, William Baker, had committed the substantive acts which led to the petitioner's conviction on the conspiracy count.

On March 4, 1997, Petitioner timely filed a motion for judgment of acquittal and a motion for new trial. Petitioner made three arguments in support of these motions: (1) there was insufficient evidence to support any of his convictions; (2) the deliberate ignorance instruction was prejudicial error; and (3) the quality of evidence was low.

On Aug. 8, 1997, the District Court issued an order granting Petitioner's motion for judgment of acquittal on the conspiracy count, finding that the Government had produced no evidence that Petitioner was aware of any alleged conspiracy. The court denied the motion as to the five substantive counts. The court also denied Petitioner's motion for new trial.

On Nov. 26, 1997, at the scheduled sentencing hearing, Petitioner requested a stay so that he could file a motion for reconsideration of the court's denial of Petitioner's motion for new trial. The court granted the stay, and on December 10, 1997, Petitioner filed a "Motion to

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[2] *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

Consider Further Motion for New Trial Based upon Court Order Dated August 8, 1997."

In this motion, Petitioner argued that, the trial court having determined post-verdict that no evidence had been produced which could sustain the conspiracy conviction, it was now apparent that the *Pinkerton* instruction should not have been given. The presence of the instruction cast serious doubt on the validity of the substantive convictions. Having wrongly convicted Petitioner of conspiracy, and the Government having produced convincing evidence of the Bakers' substantive acts, the jury may well have convicted Petitioner on the basis of the Bakers' wrongful acts.

Respondent countered that the trial court had no jurisdiction to entertain the December 10, 1997 motion because it was untimely.[3]

The Government first argued that a motion for new trial must be made within seven days after the finding of guilty, and if the motion is not timely made, the court lacks jurisdiction to consider the motion on its merits. The Government noted that Fed. R. Crim. P. 33 does not

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[3] The Government also made certain substantive arguments, which the trial court also addressed. The same arguments were made before the Court of Appeals. However, the Court of Appeals, in reversing the trial court, did so entirely based upon the timeliness issue, and specifically declined to consider the substantive issues. For that reason, the instant petition addresses the substantive issues only so far as is necessary to provide the Court with a coherent overview of the case.

specifically provide a time for filing a motion to reconsider the denial of a prior motion for new trial. However, the Government argued, petitions for rehearing of orders affecting final judgment are timely filed if made within the period allotted for the noticing of an appeal, citing *United States v. Cook*, 670 F.2d 46, 48 (5th Cir.), *cert. denied*, 456 U.S. 982, 102 S. Ct. 2255 (1982) and *United States v. Miller*, 869 F.2d 1418, 21 (10th Cir. 1989). The Government argued that an appeal from a Fed. R. Crim. P. 33 motion denial must be taken within ten days from the District Court's order. Citing cases[4] in which the Rule 33 motion was filed after the entry of judgment, the Government argued that Petitioner's motion for reconsideration should have been filed, at the latest, ten days after the denial.

Petitioner responded that *Cook* and *Miller* indeed controlled, but that since judgment had not yet been entered, and the denial of the Motion for New Trial was not a final appealable order, the time for appeal had not yet begun to run, and the motion for reconsideration was thus timely filed.

On March 17, 1998, the District Court denied Petitioner's motion. The Court ruled only on the merits of the case, and declined to rule on the timeliness issue. The Court first agreed that, while it was a correct statement of law given the presence of the conspiracy charge, the *Pinkerton* instruction should not have been given since "the record was not sufficient to enable the jury to find

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[4] *United States v. Hatfield*, 815 F.2d 1068, 1073 (6th Cir. 1987); *United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992).

the defendant guilty beyond a reasonable doubt of conspiracy." The court then ruled that, as to the substantive counts, although the evidence against Petitioner was very weak, there was some evidence by which the jury could have directly convicted Petitioner on those counts. In light of *Griffin v. United States*, 502 U.S. 46, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991), the court said, the motion for reconsideration must be denied.

Ten days later, Petitioner filed a motion for reconsideration of the March 17, 1998 order. Petitioner argued that *Griffin* did not apply, because the *Griffin* rationale did not apply: that juries may be trusted to follow its instructions. Here the jury patently did not follow its instructions, since it convicted Petitioner of a charge unsupported by evidence. It followed that the standard applied by the District Court, whether there was "some evidence" by which Petitioner might have been convicted on the substantive counts, was an incorrect standard. Citing *United States v. Castaneda*, 16 F.3d 1504 (9th Cir. 1994), *U.S. v. Olano*, 62 F.3d 1180, 1199 (9th Cir. 1995), and *United States v. Manarite*, 44 F.3d 1407 (1995), Petitioner pointed out that the proper standard to be applied in this circumstance was whether beyond reasonable doubt, Petitioner would have been convicted even in the absence of the erroneously-given *Pinkerton* charge. The Government in its response to Petitioner's December 10, 1997, motion, also asserted that this was the correct standard.

On June 12, 1998, the District Court issued an opinion in which it agreed with Petitioner and the Government that the *Castaneda/Olano/Manarite* trio of cases correctly stated the proper standard. The Court issued an order

applying that standard, vacated Petitioner's conviction on the substantive counts, and granted a new trial.

The Court also addressed the timeliness issue, and agreed with the Petitioner that the motion for reconsideration was timely filed:

> The government also claims that defendant's motion for reconsideration is untimely. The federal rules of criminal procedure do not specify a time limit for filing a motion to reconsider the denial of prior motion for new trial. Case law indicates, however, that " . . . Petitions for rehearing of orders affecting final judgment are timely filed if made within the period allotted for the noticing of an appeal." *United States v. Miller*, 869 F.2d 1418, 1420-21 (10th Cir. 1989) (quoting *United States v. Cook*, 670 F.2d 46,48 (5th Cir. 1982)). Under Fed. R. App. P. 4(b), if a defendant makes a timely motion for a new trial, "an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later."
>
> In this case, defendant made a timely motion for a new trial and it was ruled on. Judgment of conviction, however, has not yet been entered. Therefore, defendant's motion for reconsideration is not time-barred under the relevant provisions of Fed. R. App. P. 4(b).

On June 25, 1998, Respondent appealed the trial court ruling to the United States Court of Appeals for the Sixth Circuit. That court had jurisdiction under 18 U.S.C. § 3731.

Respondent argued, as relevant to this petition, that the trial court was without jurisdiction to do what it had

done based upon the timeliness issue. Specifically, as relevant to the ruling by the Court of Appeals, Respondent argued that the motion for reconsideration was actually a new, successive Motion for New Trial, because the *Pinkerton* instruction had not been argued in the original Motion for New Trial. Petitioner responded that under *United States v. Ibarra*, 116 L. Ed. 2d 1, 502 U.S. 1, 112 S. Ct. 4 (1991) (*per curiam*), the court was not to break down into subcategories the more general category of "motions for reconsideration" described in the Court's previous opinions, namely *United States v. Dieter*, 429 U.S. 6, 97 S. Ct. 18 (1976) and *United States v. Healy*, 376 U.S. 75, 84 S. Ct. 553, 11 L. Ed. 2d 527 (1964).

Responsive pleadings were filed, and on Nov. 16, 1999, the Court of Appeals reversed the District Court order granting Petitioner a new trial, reinstated Petitioner's convictions on the counts of bank fraud and misapplication of bank funds, and remanded for sentencing on those counts. The Court declared that the motion for reconsideration was really a second Motion for New Trial because it raised the *Pinkerton* instruction for the first time. The Court of Appeals did not address Petitioner's timeliness arguments except to note that the cases cited "are inapposite."

REASONS FOR GRANTING THE PETITION

This case involves an important procedural problem affecting the foundational ability of the District Courts to resolve court-generated errors when brought to the

court's attention by motions for reconsideration. As noted by the Court of Appeals for the Fifth Circuit, the petition for rehearing is useful "in its contribution to judicial economy through its direction of issues demanding plenary consideration to that forum possessing a close acquaintance with the factual posture of the case." *United States v. Cook*, 670 F.2d 46 at 48 (5th Cir. 1982), citing *United States v. Dieter* (1976), 429 U.S. 6, 97 S. Ct. 18, 19. Because the Court of Appeals took a highly restrictive view of what constitutes a "real" motion for reconsideration, as opposed to a subsequent motion for new trial masquerading in the sheep's clothing of a motion for reconsideration, the District Court was deprived of the opportunity to correct its own mistake. The Court of Appeals held that because the *Pinkerton* instruction was raised for the first time in the December 10, 1997, "Motion to Consider Further Motion for New Trial Based upon Court Order Dated August 8, 1997", it was not a motion for reconsideration at all, but a subsequent Motion for New Trial. It necessarily followed that the subsequent Motion for New Trial was not timely filed.

The Court of Appeals was incorrect. In order to find that Petitioner's motion for reconsideration was nothing more than an impermissible, subsequent Motion for New Trial, the Court applied two cases from the 10th and 11th Circuits which, even if good law under the circumstances of the cases, materially differed from the circumstances in the instant case. Furthermore, the Court completely ignored the plain English language of *United States v. Ibarra*, 116 L. Ed. 2d 1, 502 U.S. 1, 112 S. Ct. 4 (1991) (*per curiam*).

The Court of Appeals relied upon the cases of *United States v. Custodio*, 141 F.3d 965 (10th Cir. 1998) and *United*

States v. Bramlett, 116 F.3d 1403 (11th Cir. 1997) for its holding. While these cases at first glance would appear to offer some support for the Court's decision, they can easily be distinguished. In both *Custodio* and *Bramlett*, the grounds for new trial existed at the time the motion for new trial was originally filed, and the defendant was simply going back for a second bite at the apple. The renewed motions simply did not in any way relate back to the initial motions.

In the instant case, the *Pinkerton* grounds for new trial did not exist until the court acquitted Petitioner of the conspiracy count. So long as the conspiracy conviction held up, the *Pinkerton* charge was a valid instruction, and Petitioner had no reason to attack it.

In both the Motion for New Trial and Motion for Acquittal, Petitioner argued, *inter alia*, that there was no evidence supporting the conspiracy conviction. Once the conspiracy conviction was overturned, however, the *Pinkerton* instruction became a ground for error. Thus the issue raised in the motion for reconsideration flowed directly from the Motion for New Trial, and was not a "new issue". Unlike the defendants in *Custodio* and *Bramlett*, Petitioner was not simply seeking a second bite at the apple.

Even if Petitioner could theoretically have raised the *Pinkerton* problem before the conspiracy conviction was overturned, this ultimate result of the overturning of the conspiracy conviction was anything but obvious. Indeed, an experienced and highly respected District Court judge did not recognize the scope of the problem until a second motion for reconsideration was filed. Even aside from the

fact that the issue raised in the motion for reconsideration was not "new", the ruling of the Court of Appeals is in direct conflict with the Supreme Court's ruling in *United States v. Ibarra*, 116 L. Ed. 2d 1, 502 U.S. 1, 112 S. Ct. 4 (1991) (*per curiam*). In *Ibarra*, the United States District Court for the District of Wyoming had granted the accused's suppression motion. The Government filed a motion for reconsideration on a basis which had been expressly abandoned at the suppression hearing. The District Court denied the motion. The Government then noticed an appeal 76 days after the initial suppression order, but less than 30 days after the denial of the motion for reconsideration. The United States Court of Appeals for the Tenth Circuit dismissed the appeal as untimely on the basis that, because the motion had sought reconsideration of a previously disavowed theory, it was not a true motion to reconsider, and therefore did not toll the 30-day period to appeal which began to run on the date of the initial order. The Supreme Court vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals. The Court reiterated the benefits of giving district courts "the opportunity to correct their own alleged errors, [preventing] unnecessary burdens being placed on the courts of appeals." *Ibarra* at 502 U.S. at 5. The Court specifically rejected the Appeals Court's attempt to classify the Government's motion as something other than a motion for reconsideration:

> The Court of Appeals' opinion can be read to hold that because the Government did not initially urge the argument which it made in its motion for reconsideration, that motion was not a "true" motion for reconsideration which would extend the time for appeal. But this

> method of analysis, too, would break down into subcategories the more general category of "motions for reconsideration" described in our previous opinions. Here, the Government's motion before the District Court sought to " 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.' " *Dieter*, 429 US, at 8-9, 50 L Ed 2d 8, 97 S Ct 18 (quoting *Department of Banking of Neb. v Pink*, 317 US 264, 266, 87 L Ed 254, 63 S Ct 233 (1942)). That is sufficient under *Healy* and *Dieter*. 3

The only significant distinction between *Ibarra* and the instant case is that in *Ibarra*, the argument urged upon reconsideration had at one time been urged, but then abandoned before the trial court, while in the present case, the argument urged in the motion for reconsideration simply did not arise until the court had responded to Defendant's timely motion for new trial.

It is difficult to comprehend how raising an argument specifically abandoned in the trial court is appropriately considered a motion for reconsideration, while Defendant's motion, which urged a basis for relief which simply did not exist until the court ruled in the way that it did on Defendant's original motion, is not. In any event, the motion "sought to " 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.' ". *Ibarra* at 7. As succinctly put by the Supreme Court, "That is sufficient under *Healy* and *Dieter*." *Ibid.*

Before the Court of Appeals, Respondent attempted, and presumably will attempt before this Court, to distinguish *Ibarra* on the basis that the Court "based its holding

on the important reliance interests implicated by a time-trigger for filing an appeal."

Petitioner suggests that that is a distinction without a difference. In both cases, the crucial issue was time, and the question of whether the motion was a true motion for reconsideration or a subsequent motion for new trial masquerading as a motion for reconsideration was the determinative question. The plain language of the decision makes no such distinction

In the instant case, the Court of Appeals also expressed concern over the spectre of repeated motions long after the expiration of the seven-day time limit, and the resultant uncertainty and confusion resulting therefrom. Likewise, the Court noted that "[i]t is in the interest of justice that a decision on the propriety of trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past," citing *United States v. Smith*, 331 U.S. 469 at 476 (1947).

However, there are strong policy issues that weigh toward reaffirming the trial court's finding of jurisdiction. First, in the instant case, the major issues are all legal, not factual. There is one factual element, in that, as discussed *infra*, if the evidence against the Defendant is so overwhelming that the jury would undoubtedly have convicted the Defendant even in the absence of the *Pinkerton* instruction, a new trial is not required. However, as noted in the statement of the case, the trial court, even before sending the case to the jury, had made clear its belief that the Government's case was very weak. There is

absolutely no danger here that the trial court's assessment of the evidence presented by the Government has dramatically changed over time, so that it is now "uncertain and dim."

Secondly, as noted by the Court of Appeals for the Fifth Circuit, the petition for rehearing is useful "in its contribution to judicial economy through its direction of issues demanding plenary consideration to that forum possessing a close acquaintance with the factual posture of the case." *United States v. Cook*, 670 F.2d 46 at 48 (5th Cir. 1982), citing *United States v. Dieter*, 429 U.S. 6, 97 S. Ct. 18, 19 (1976). This is singularly apropos in the instant case.

The *Pinkerton* instruction has been long recognized as an appropriate means by which a jury may convict a defendant of the substantive crimes of his fellow conspirators, even when there is no evidence that the defendant personally committed or aided and abetted the substantive crimes. Thus, whenever the court permits a conspiracy count to go to the jury, it is perfectly permissible and appropriate to include a *Pinkerton* instruction. Because the District Court permitted the conspiracy count to go to the jury, and therefore properly included a *Pinkerton* instruction, there was no basis for the Defendant to argue the inclusion of the *Pinkerton* instruction as basis for acquittal or for a new trial. It was not until after the court granted the Defendant's motion for judgment of acquittal on the conspiracy count that the grounds for new trial based on the *Pinkerton* instruction arose.

These are essential matters which the Court of Appeals completely ignored. If there is a unifying principle among the *Dieter/Ibarra* and *Custodio/Bramlett* line of cases, it is that simple attempts to get successive bites at the apple, raising new grounds which could and should have been raised in the original motion, will not be considered. Issues justifiably raised in a motion for reconsideration, however, will properly be considered.

If the ruling by the Court of Appeals is allowed to stand, the use of the motion for reconsideration as an effective tool to correct errors at the trial level, and to make the most efficient use of judicial resources, will be severely hampered. Affirmance of the District Court will permit the continued effective use of that tool, and there are more than adequate safeguards against abuse of the tool.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, Plaintiff,

v.

Fred E. Henning, Defendant.

Case No. 3:95CR758

ORDER

(Filed 6/12/98)

This is a criminal case in which defendant Henning has filed a motion for reconsideration. (Doc. 197). In his motion, he seeks reconsideration of my decision (Doc. 196) overruling his earlier motion to consider further his new trial motion. (Doc. 188). For the reasons that follow, the motion for reconsideration shall be granted, and a new trial shall be ordered.

Defendant was initially convicted of conspiracy to commit bank fraud and misapply bank funds and of the substantive offenses of bank fraud and misapplication of bank funds. Before submission of the case to the jury, he had moved unsuccessfully for judgment of acquittal as to the conspiracy charge. After the jury's verdict, I concluded that there was insufficient evidence to support the conspiracy conviction. (Doc. 157).

The jury instructions included a *"Pinkerton"* charge, whereby the jury was told that it could convict the defendant of the substantive offenses of bank fraud and misapplication of bank funds if it found that the defendant was a conspirator and those substantive offenses were committed by any one of his coconspirators. In addition, the

jury was instructed that it could convict the defendant either on the basis of his own culpability for such acts or as an aider and abettor in the commission of such acts by his codefendants.

The defendant contends that the failure of proof with regard to the conspiracy count invalidates the jury's finding of guilt on the substantive offenses. Specifically, defendant argues that the jury, having found that he was involved in a conspiracy to commit the substantive offenses, is likely to have thereafter found the defendant guilty of the substantive offenses solely on the basis of the illegal acts of his coconspirators. Thus, the argument goes, the jury most likely did not reach the question of the defendant's culpability either individually or as an aider and abettor.

The government claims that this argument is unavailing in light of the Supreme Court's ruling in *Griffin v. United States*, 502 U.S. 46 (1991). In *Griffin*, the defendant was charged with conspiring to commit two offenses. There was a failure of proof as to one of those offenses, but not as to the other. The defendant challenged the jury's general verdict of guilt as to the conspiracy charge on the basis that a court could not tell whether that verdict was based on the offense as to which there was no proof, or on the offense as to which proof was adequate. In upholding the verdict, the Court reconfirmed the common law doctrine that, where a conviction could have been based on either of two grounds, it may be affirmed

even though, as to one of those grounds, there was insufficient evidence in the record to sustain a conviction.[1]

In this case, the jury could have convicted the defendant of commission of the substantive offenses on either of three grounds: under *Pinkerton* as a conspirator responsible for the acts of his coconspirators, on the basis of his individual culpability, or as an aider and abettor. As a result, however, of my post-trial decision that the defendant could not have been found guilty as a conspirator, he necessarily could not properly have been found guilty of the substantive offenses under the *Pinkerton* doctrine and instruction.

Though I concluded that the conspiracy conviction could not stand, I also found that there was sufficient evidence to support a conviction on those substantive

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[1] The government also claims that defendant's motion for reconsideration is untimely. The Federal Rules of Criminal Procedure do not specify a time limit for filing a motion to reconsider the denial of a prior motion for new trial. Case law indicates, however, that " ' . . . petitions for rehearing of orders affecting final judgment are timely filed if made within the period allotted for the noticing of an appeal.' " *United States v. Miller*, 869 F.2d 1418, 1420-21 (10th Cir. 1989) (*quoting United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982)). Under Fed. R. App. P. 4(b), if a defendant makes a timely motion for a new trial, "an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, *whichever is later.*"

In this case, defendant made a timely motion for a new trial and it was ruled on. Judgment of conviction, however, has not yet been entered. Therefore, defendant's motion for reconsideration is not time-barred under the relevant provisions of Fed. R. App. P. 4(b).

counts on either of the other two grounds. The ruling in *Griffin* thus appears on initial consideration to answer the defendant's argument; though one of the alternative grounds for his conviction cannot be upheld, his conviction on the substantive offenses appears to be sustainable because there is evidence to support a finding of guilt either individually or as an aider and abettor.

Closer examination of *Griffin* persuades me, however, that its holding should not apply in this case. The Court in *Griffin* stated:

> "it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, *in the absence of anything in the record to show the contrary,* the presumption of law is that the court awarded sentence on the good count only."

502 U.S. at 49-50 (*quoting Claassen v. United States,* 142 U.S. 140, 146 (1891)) (emphasis added). The Court also pointed out that this doctrine was based on the presumption that, while "jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," they "*are* well equipped to analyze the evidence." *Id.* at 59. Thus, the Court stated:

> "It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance – remote, it seems to us – that the jury convicted on a ground that was not supported by adequate evidence when there

existed alternative grounds for which the evidence was sufficient."

Id. at 59-60 (*quoting United States v. Townsend*, 924 F.2d 1385, 1414 (1991)).

Underlying the holding in *Griffin* is the view that, when given a choice between sufficient and insufficient grounds, juries will in all likelihood convict only on sufficient grounds. Generally there will be no reason to believe that a jury would find a defendant guilty of a crime as to which there was no proof when it could find him guilty of some other offense as to which there was sufficient proof.

This presumption is, however, undercut by the facts of this case. Here, once the jury found the defendant guilty of the conspiracy, it simply had to find that one of the other coconspirators committed bank fraud and misapplication of bank funds. There was no dispute that the codefendants committed the substantive offenses. Thus, there is a distinct possibility that the jury, rather than assessing whether the proof sufficed to convict the defendant on the basis of his own acts, or on the basis of his status as an aider and abettor, convicted him solely on the basis of his association (which I have found, as a matter of law, did not constitute conspiracy) with his alleged coconspirators.

The jury's consideration in this case of the defendant's culpability for the substantive offenses differed significantly from the jury's consideration of the defendant's culpability in *Griffin*. In *Griffin*, there was no reason to believe that the jury convicted on an improper ground rather than a proper one. Here, in contrast, there

is no reason to believe that the jury, once it found that defendant was a coconspirator, did not rely on the *Pinkerton* instruction to find the defendant guilty of the substantive charges. In which case, it would, albeit understandably, have bypassed any consideration of the defendant's individual guilt, or his guilt as an aider and abettor.

The only cases I have found that address the specific issue raised here support defendant's argument. Thus, in *United States v. Castaneda*, 16 F.3d 1504, 1511 (9th Cir. 1994), the jury was instructed that two defendants could be found liable for the substantive crime of money laundering either under the *Pinkerton* doctrine, individually, or as aiders and abettors. After the jury convicted the defendants of conspiracy to commit money laundering and of the substantive crime of money laundering, the court found that, without certain improperly admitted evidence, no rational trier of fact could have found them guilty of conspiracy. The court therefore reversed the conspiracy conviction. *Id.* at 1509.

The court then turned to the defendant's argument that the erroneous admission of the improper evidence and the *Pinkerton* charge premised thereon required reversal of the convictions on the substantive money laundering counts. The court held that, where liability based on a *Pinkerton* instruction was unsupported by the record, a conviction on the substantive counts must be reversed "unless we find beyond a reasonable doubt that the jury would have convicted [the defendants] of each substantive count either as aiders and abettors or as principals." *Id.* at 1511-12. Because the evidence clearly showed that both defendants had personally participated

in the money laundering operation, the court had "no doubt" that "the verdicts would have been the same as to each defendant" regardless of the impropriety of a verdict based on *Pinkerton*. *Id.* at 1512. *Accord, United States v. Olano*, 62 F.3d 1180, 1199-1200 (9th Cir. 1995); *United States v. Manarite*, 44 F.3d 1407, 1414 n.9 (9th Cir. 1995) (because the "evidence clearly shows that both defendants directly participated in the substantive crimes of which they were convicted, money laundering and transportation and receipt of stolen property," jury would have convicted despite *Pinkerton* charge).

The rule to be abstracted from these cases is that invalidation of the *Pinkerton* ground for conviction on a substantive count does not require reversal where it appears beyond a reasonable doubt that the jury would have reached the same result without the *Pinkerton* instruction. In *Castaneda, Manarite,* and *Olano* the evidence of personal culpability was so strong that the court could be confident beyond a reasonable doubt that the jury would have convicted in any event.

I recognize that the Ninth Circuit approach appears to contradict the common law rule reaffirmed in *Griffin*.[2] Indeed, the *Griffin* Court rejected the argument that, after a failure of proof as to one alternative ground, a conviction could be upheld only where "one can be *sure* that the jury did not use the inadequately supported ground as the basis of conviction." 502 U.S. at 58. Nonetheless, the

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[2] Interestingly, despite their divergence from *Griffin*, the government cites both *Castaneda* and *Manarite* as pronouncing the rule of law to be applied in this situation.

Ninth Circuit's standard is appropriate where, as in *Castaneda, Manarite* and *Olano,* error in giving a *Pinkerton* instruction may have led to conviction on the basis of derivative culpability, rather than the defendant's own acts or status as an aider and abettor. Where it is probably that a *Pinkerton* charge caused a non-conspirator to be convicted of substantive offenses without consideration of his individual criminality, the higher degree of judicial scrutiny reflected in *Casteneda, [sic] Manarite,* and *Olano* is necessary.

Although there was sufficient evidence to convict defendant either as a principal or as an aider or abettor, the proof is far from overwhelming. Based on the record and the proceedings as a whole, it is reasonable to doubt that the jury would have convicted the defendant of the substantive crimes of bank fraud and misapplication of funds absent the *Pinkerton* charge. Certainly, I am not persuaded beyond a reasonable doubt that the conviction would have been returned on the substantive counts if they had been tried alone, or submitted to the jury without the conspiracy charge and *Pinkerton* instruction. Indeed, based on the record at trial, I cannot say that it is more likely than not that the conviction would have resulted. It may have; but it also might not have. It is more likely, in any event, that the jury, after finding the defendant to have been a conspirator, simply proceeded to find him guilty of the substantive counts on the basis of the unquestioned culpability of his coconspirators.

Rule 33 of the Federal Rules of Criminal Procedure provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." A trial judge may grant a Rule 33

motion "where the evidence preponderates heavily against the verdict," *United States v. Pierce*, 62 F.3d 818, 825 (6th Cir. 1995), or where the judge believes the jury may have been confused by the jury instructions, *Bustamante*, 1992 WL 192545 at *1. Indeed, "[a]ny error of sufficient magnitude to require reversal on appeal is an adequate grounds for granting a new trial." 3 Wright, Federal Practice and Procedure § 556 (2d ed. 1982).

Because I am convinced that my erroneous submission to the jury of a *Pinkerton* charge is likely to have resulted in substantial injustice to the defendant, in that the jury quite possibly convicted him on an invalid ground rather than one of two possible valid ones, I believe a new trial is warranted. The defendant, if substantial justice is to be done in this case, is entitled to consideration by the jury of his guilt or innocence on the basis of *his* conduct, and not on the basis of the acts of admitted felons with whom he was not associated as a criminal coconspirator.

Conclusion

In light of the jury's conviction on the conspiracy charge, the *Pinkerton* instruction, and the substantial evidence of criminal activity by defendant's coconspirators, it is highly unlikely that the jury, once it found defendant to have been a conspirator, ignored that finding and determined whether he was guilty of bank fraud and misapplication of bank funds individually or as an aider and abettor. Upholding the jury's conviction in this case, where there is substantial doubt as to the propriety of the

jury's verdict due to the erroneous submission of a *Pinkerton* charge, would deprive defendant of substantial justice. Accordingly, it is hereby

ORDERED THAT

1) Defendant's motion for reconsideration (Doc. 197) be, and same hereby is, granted;

2) Defendant's conviction be, and hereby is vacated;

3) A new trial be, and hereby is granted; and

4) Scheduling conference be held Monday, June 29, 1998, at 1:30 p.m. before the undersigned; out of town counsel may participate by phone.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

NOT RECOMMENDED FOR FULL-TEST PUBLICATION

No. 98-3748

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	**ON APPEAL FROM THE UNITED STATES**
Plaintiff-Appellant,	)	**DISTRICT COURT FOR THE NORTHERN**
v.	)	**DISTRICT OF OHIO**
FRED E. HENNING,	)	**OPINION**
Defendant-Appellee.	)	**(Filed Nov. 16, 1999)**

Before: WELLFORD, SURHEINRICH, and COLE, Circuit Judges.

R. GUY COLE, Jr., Circuit Judge. The United States appeals the district court's grant of a new trial to defendant Henning on the basis that the district court was without jurisdiction to hear defendant's motion and erred in vacating Henning's conviction. We **REVERSE** the district court because it lacked jurisdiction to hear Henning's motion for a new trial; **REINSTATE** the convictions that were vacated; and **REMAND** for sentencing.

I.

At the time of the offenses, Henning was a vice-president and general counsel of First Federal Savings and Loan Association of Toledo, Ohio and served on the

bank's loan committee with Don Baker, the bank's chairman and chief executive officer, and Leon Corns, the bank's in-house appraiser. On the basis of false appraisals prepared by Corns at the request of Baker, the loan committee made a series of loans to William Baker, Don Baker's son, for the purchase of two bank-owned properties. As a member of the loan committee, Henning approved these loans.

Henning was charged with three counts of bank fraud, in violation of 18 U.S.C. § 1344; five counts of misapplication of bank funds, for a total of approximately $15.8 million, in violation of 18 U.S.C. § 657; and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. § 371. The bank fraud and misapplication counts also charged Henning with aiding and abetting, in violation of 18 U.S.C. § 2.

On February 27, 1997, a jury convicted Henning on the conspiracy count, two of the bank fraud counts, and three of the misapplication counts.

On March 4, 1997, Henning filed a timely motion for judgment of acquittal and a separate motion for a new trial. On August 3, 1997, the district court granted the motion for judgment of acquittal on the conspiracy count, finding that the government failed to prove that Henning knew of the agreement between the Bakers and Corns to provide false documents and, therefore, Henning failed to join the conspiracy. The court denied the motion in all other respects. On the same day, the district court denied Henning's motion for a new trial.

On December 10, 1997, Henning filed a "Motion to Consider Further Motion for New Trial Based Upon

Court's Order Dated August 8, 1997" Henning's sentencing hearing was postponed pending adjudication. The district court denied the motion on March 17, 1998. On March 27, 1998, Henning filed a motion for reconsideration of the March 17 order denying his December 10 motion. The district court granted this motion on June 12, 1998. In vacating the remaining convictions of bank fraud and misapplication of bank funds and granting a new trial, the court held that Henning's conviction could not stand because the court was not convinced that the jury found him guilty on the substantive counts based on his conduct or aiding-and-abetting liability, instead of based on the Pinkerton charge.[1]

II.

This court reviews the grant of a motion for a new trial for abuse of discretion. *See United States v. Taylor*, 176 F.3d 331, 335 (6th Cir. 1999).

III.

The district court considered the "further motion for a new trial" and ruled on its merits without considering whether the motion was untimely. Defendant Henning

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[1] *See Pinkerton v. United States*, 328 U.S. 640 (1946). Under the Pinkerton charge, the jury was told that it could convict Henning of the substantive offenses of bank fraud and misapplication of bank funds if it found that he was a conspirator and that those offenses were committed by any of the co-conspirators. Because the district court found that the government had not presented sufficient proof of a conspiracy, the Pinkerton instruction should not have been given.

asserts that this motion, filed more than nine months after the verdict, and two months after his initial motion for a new trial was denied, is best understood as a motion for reconsideration. This case presents the circumstance in which no final judgment has been entered, more than two and a half years after the jury verdict, due to the district court's postponement of sentencing. Henning argues that because no judgment of conviction has been entered, the motion for reconsideration is timely under Fed. R. App. P. 4(b).

The government, on the other hand, asserts that the "further motion" was not in fact a motion to reconsider, but a subsequent motion for a new trial. We agree. The motion for judgment of acquittal or a new trial challenged the sufficiency of the evidence at trial. The "further motion" raised a different basis for the challenge – the court's *Pinkerton* instruction to the jury at trial.

Fed. R. Crim. P. 33 provides that, unless a new trial motion is based on newly discovered evidence, it must be filed "within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Further, Rule 45 emphasizes that "the court may not extend the time for taking any action under [Rule 33] except to the extent and under the conditions stated [in the Rule]." Fed. R. Crim. P. 45. If a defendant's motion is untimely, the district court lacks jurisdiction to consider it. *See United States v. Koehler*, 24 F.3d 867, 869 (6th Cir. 1994). This time limitation is strictly enforced. *See Herrera v. Collins*, 506 U.S. 390, 409 (1993). Untimely "renewed" or "supplemental" motions do not relate back to timely filed motions. *See United States v. Custodio*, 141 F.3d 965, 966 (10th Cir. 1998) (holding that

district court had no authority to consider an untimely "supplement" to a Rule 33 motion that raised new issues); *United States v. Bramlett*, 116 F.3d 1403, 1405-06 (11th Cir. 1997) (holding that court did not have power to consider a "renewed" motion for new trial two months after deadline had passed); *cf. United States v. Sheppard*, 149 F.3d 458, 463 (6th Cir. 1999) (holding that district court lacked jurisdiction over an untimely filed Fed. R. Crim. P. 29 motion, although defendant had filed an initial unsuccessful Rule 29 motion at the close of trial).

As a result, the district court lacked jurisdiction to hear Henning's motion, filed more than nine months after his conviction. To hold otherwise would eviscerate the strict time limits in Fed. R. Crim. P. 33 and Fed. R. Crim. P. 29. A defendant, after filing one timely motion for a new trial or motion for judgment of acquittal, could file repeated "further motions" long after the expiration of the seven-day time limit. Allowing motions after the time limit would undermine the reasons for these limits, such as avoiding the uncertainty and confusion that would result from delayed decisions. *See United States v. Davis*, 992 F.2d 635, 640 (6th Cir. 1993); *United States v. Smith*, 331 U.S. 469, 476 (1947) ("It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past."). The cases cited by Henning, which address the time limits for notice of appeal or motions for reconsideration under Fed. R. App. P. 4(b), are inapposite.

Because the district court did not have jurisdiction to consider Henning's motion for reconsideration, its grant

of that motion is a nullity. We decline to address the underlying substantive issues.

For the foregoing reasons, we **REVERSE** the district court's order granting Henning a new trial, **REINSTATE** Henning's convictions on the counts of bank fraud and misapplication of bank funds, and **REMAND** for sentencing on these counts.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 98-3748

Filed: December 20, 1999

UNITED STATES OF AMERICA

Plaintiff – Appellant

v.

FRED E. HENNING

Defendant – Appellee

MANDATE

Pursuant to the court's disposition that was filed 11/16/99 the mandate for this case hereby issues today.

A True Copy.

No cost taxed

Filing Fee .....$

Printing .....$

Total .....$

Attest:

_____

Deputy Clerk

Case No.: 98-3748
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff – Appellant

v.

FRED E. HENNING

Defendant – Appellee

BEFORE: WELLFORD, SUHRHEINRICH and COLE, Circuit Judges

Upon consideration of appellee's motion and appellant's response to stay the mandate pending an application for writ of certiorari,

It is ORDERED that the motion be [sic] hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green ps
Leonard Green, Clerk